651 App. 69.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY (LIMITED),
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Petition of Libellant for Writ of Certiorari.

WILHELMUS MYNDERSE,
Advocate.

United States Circuit Court of Appeals

FOR THE SECOND JUDICIAL CIRCUIT.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Notice is hereby given that upon the petition of the libellant, verified the 27th day of April, 1898, and upon all the pleadings and proceedings herein, we shall on Monday, the 2d day of May, 1898, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States, at the Capitol, in the City of Washington.

New York, April 27, 1898.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libellant.

To HAND & BONNEY,
Proctors for Respondent.

4 SUPREME COURT OF THE UNITED STATES.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,
against
THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

5 And now comes the Canada Sugar Refining Company, Limited, by Wilhelmus Mynderse, its advocate, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all of the proceedings by them had in the suit now or lately before them, wherein The Canada Sugar Refining Company, Limited, was libellant and The Insurance Company of North America was respondent.

WILHELMUS MYNDERSE,
Advocate for Petitioner.

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TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the Canada Sugar Refining Company, Limited, that a writ of *certiorari* may issue to the Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit to bring before the Supreme Court a certain case wherein the said Canada Sugar Refining Company, Limited, is libellant, against the Insurance Company of North America, respectfully shows:

FIRST.—At all the times hereinafter mentioned the petitioner was a corporation organized and existing pur-

suant to the laws of the Dominion of Canada, and there 7
engaged in the importation of raw sugars and the refining thereof, and at all such times the respondent was, ever since, has been and still is a corporation organized and existing under and pursuant to the laws of the State of Pennsylvania, and lawfully engaged in the business of marine insurance.

SECOND.—At divers times between January 20, 1893, and February 8, 1893, the petitioner caused to be shipped at Iloilo for its account by Kerr & Company of Iloilo upon the ship *John E. Sayre* 73,089 mats of sugar, weighing about 39,360 piculs, being about 2,462 tons, to be delivered at Montreal, Canada.

THIRD.—At divers dates, to wit, December 9, 1892, and 8
in March, 1893, and in April, 1893, the petitioner caused the sugars to be insured by the Atlantic Mutual Insurance Company to cover from time to time the increased market value of the sugars, the market therefor being a rapidly rising market. The insurance of the sugars by the Atlantic Mutual Insurance Company was finally completed prior to the 29th day of April, 1893, at $166,145, the *John E. Sayre* being then at sea bound on her voyage from Iloilo to Montreal.

FOURTH.—The petitioner further alleges that on the 29th day of April, 1893, the said *John E. Sayre* being at sea as aforesaid, and the value of the sugars, exclusive of freight, being then about $181,000, and there being a value in excess of the insurance placed thereon by the petitioner 9
with the Atlantic Mutual Insurance Company, it caused its profits upon the sugars, being then valued at $15,000, to be insured by the Insurance Company of North America in said valued amount of $15,000 for the voyage from Iloilo to Montreal, under a certificate of insurance issued to the petitioner in the following words:

"INSURANCE COMPANY OF NORTH AMERICA.

"$15,000. PHILADELPHIA. No. 39,600.

"This is to certify that on the 29th day of April,
"1893, this company insured under policy No. 117407,

10 "made for Robert Hampson, $15,000^{00}_{100}$ dollars on "profits on cargo of sugar against total loss "only, valued at sum insured, shipped on board "of the British ship *John E. Sayre* at and "from Iloilo to Montreal, and the loss if any "subject to the terms and conditions of the policy "has been made payable to the order of Canada Sugar "Refining Company, Limited, on surrender of this certi-"ficate.

"GRENTLER FRYER, Secretary.
"WILLIAM A. PLATT, Second Vice-President.

"Not valid unless countersigned by the company's "duly authorized agent at Montreal.
"Countersigned at Montreal this 29th day of April, 1893.

11 "ROBERT HAMPSON, Agent.

"Incorporated 1794."

FIFTH.—The petitioner further shows that the ship *John E. Sayre* being at the time in every way fitted for her contemplated voyage, sailed from Iloilo with said sugars on board on the 10th day of February, 1893, bound for Montreal; and on the 4th day of July, 1893, the said ship being still in the prosecution of her voyage, met with heavy fog off the coast of Newfoundland, and in the early morning of July 6th, during the prevalence of such fog, stranded on the coast of Newfoundland about eleven miles east of Cape Ray and about one mile east of the entrance to Port Au Basque Harbor, and that she sub-
12 sequently at such place of stranding became a total wreck.

The petitioner on the 6th day of July, and immediately upon receiving advices of the distress that had come to the said ship informed the underwriters thereof, and the Atlantic Mutual Insurance Company thereupon assumed and undertook to take such possession of the cargo as was possible, and dispatched vessels to the relief of the *John E. Sayre*, and in conjunction with the master of the vessel employed salvors to save the sugars under an agreement that the salvors, who were residents in Newfoundland, should receive one-half of the sugars as salvage compensation.

The said insurers incurred other expenses in the em- 13
ployment of vessels and agents and surveyors, in addition to the obligations incurred under the agreement with the salvors, and by their efforts a certain amount of the cargo, to wit, 9,900 mats, many of which were in wet and damaged condition, weighing about 325 tons, were taken out of the *John E. Sayre* by small sailing craft and landed in Newfoundland.

Pursuant to the terms of the salvage agreement the salvors became entitled to receive one-half of the sugars so landed as salvage compensation, and thereafter the insurers adjusted the claims and rights of the salvors purchasing from them their interest in the sugars at a price substantially one-half of the value of the sugars.

Thereupon the insurers, the Atlantic Mutual Insurance 14
Company, brought the said 325 tons of sugars to Montreal. The transportation was by the steamer *Tiber*, under bills of lading reciting that the sugars were shipped at Channel, Newfoundland, by Harvey & Co., who were the resident agents of the insurers, and consigned to the Atlantic Mutual Insurance Company.

There an adjustment was made between the Atlantic Mutual Insurance Company and the petitioner, whereby the petitioner took over from the Atlantic Mutual Insurance Company, in part payment of its loss, the said 325 tons of sugars in their damaged condition at an agreed and reasonable value, and received from the Atlantic Mutual Insurance Company in cash the balance of the policy of insurance upon the sugars in the amount of 15
$142,748.81.

SIXTH.—The petitioner further shows that this adjustment then and there made between the petitioner and the Atlantic Mutual Insurance Company fully satisfied the claims of the petitioner against the Atlantic Mutual Insurance Company, by giving to the petitioner property and money aggregating in value the exact sum of the insurance, to wit, $166,145.

SEVENTH.—The petitioner further alleges that the profits insured by the Insurance Company of North America

16 in the amount of $15,000 were wholly lost by reason of the disaster which came to the ship *John E. Sayre* and the perils to which the sugars were subjected.

EIGHTH.—The petitioner in due course presented proofs of such loss, and upon the claim being rejected by the Insurance Company of North America, filed its libel *in personam* in the District Court of the United States for the Southern District of New York, on the 27th day of November, 1894.

The libel set forth the circumstances of the shipment and insurance and loss of the sugars as hereinbefore stated, and alleged that the profits of the libellant upon the cargo had become a total loss.

17 On the 25th day of January, 1895, the Insurance Company of North America filed its answer to the libel, by which it admitted that at the time of making the insurance upon the profits the real value of the sugars was $181,000, and that the profits of the libellant had been insured as alleged in the amount of $15,000, and that the total value of the sugars which reached Montreal was "about $20,000." The defence of the insurer rested upon the allegation that by reason of the saving and delivering of a part of the cargo at Montreal, the insurer became relieved and discharged from all liability to the libellant under its contract of insurance.

NINTH.—The case came on for trial in the District Court
18 before the Honorable ADDISON BROWN, District Judge, December 7, 1896. Upon the trial proofs were presented by the libellant that it had substantially abandoned the sugars to the Atlantic Mutual Insurance Company, who had thereupon taken charge of the salvage operations and had purchased from the salvors their interest in the saved sugars, and had shipped the said sugars in a damaged condition to Montreal in their own name, and had subsequently effected an adjustment with the libellant by which the remnant of sugars was taken over by the libellant at an agreed valuation, the balance of the Atlantic Mutual policy in the amount of $142,748.81 being paid in cash.

The respondent offered no proofs. 19

On the 3d day of June, 1897, the learned District Judge filed his opinion, in which he held that he could not sustain the defense of the insurers in any aspect of the case. He held:

"There was a practical abandonment to the Atlantic "Mutual, the insurers on cargo. On their policy there "was a constructive total loss, since not one-tenth net "value of their policy was saved. That company's rights "as respects any abandonment were superior; and the "defendant company could not legally have any aband- "onment to itself as insurer on profits, except on payment "to the insurer on cargo of the whole amount of the lat- "ter's liability—in this case an absurd alternative. A "policy on profits in a case like this precludes any possi- "bility of an abandonment by the assured by his own act "alone; and hence no attempt to abandon to the defend- 20 "ant was required."

The learned District Judge further held "The Atlantic "Mutual settled with the petitioner as and for a construc- "tive total loss under its policy of $166,145, and it turned "over the sugars saved in part settlement of that sum on "about the basis of the axerage *pro rata* policy valua- "tion," and also said:

"The receipt of about one eighth of this cargo by "the libellant in the manner above described does not "affect the libellant's right to recover as for a 'total "loss'; (1) because upon every pound of sugar rescued "more than half its value had been paid in order "to recover it, so that there was not only an actual total "loss of 'profits' but a constructive total loss of the sugar "as well, and insurance on profits is subject to a con- "structive total loss; (2) because none of the sugar ever "came to the libellant in the ordinary course of the 21 "voyage or through any delivery to the libellant as con- "signee by the carrier; but only through a delivery by the "insurer of cargo after practical abandonment to the latter "and through a settlement by the insurer as upon a total "loss, in which the sugar was received by the libellant "upon an equitable basis in part payment and as the "equivalent of its value in cash, as any other property "might have been received."

Thereupon and on the 15th day of June, 1897, a decree was entered in favor of the libellant for the amount of the insurance, with interest and costs, in the aggregate amount of $18,056.45.

22 TENTH.—Appeal was taken by the respondent from this decree to the United States Circuit Court of Appeals for the Second Judicial Circuit, where it came on for argument in March, 1898. A decision was filed April 18, 1898, reversing the decree of the District Court and directing that the libel be dismissed.

Subsequently, and on the 22d day of April, 1898, an order was entered accordingly in the said United States Circuit Court of Appeals directing the issuance of a mandate to the District Court to carry out the provisions of the decree.

ELEVENTH.—The opinion of the Circuit Court of Appeals proceeds upon the theory that there can be no con-
23 structive total loss of profits, while recognizing that the American Courts establish a fifty per cent. loss as a foundation for a constructive total loss of either goods or vessel. *No judicial authority* for the distinction between a constructive total loss on profits, and a constructive total loss on goods or vessel is cited by the Circuit Court of Appeals, although their decision upon such question is directly opposed to that of the District Judge.

Reference is however made by the Circuit Court of Appeals to certain text writers who intimate that the rule of constructive total loss of over fifty per cent. of the value is not applicable to a policy on profits in favor of the owner of the goods.

Upon this point there is unquestionably *a difference of opinion among text writers* (when a portion of a ship-
24 ment is delivered in sound condition), and there is an entire absence of authoritative American judicial decision, the nearest approach to such decision being a somewhat inconclusive remark of Mr. Justice Kent, when he says:

> "What shall be the criterion of an average or total loss "in respect to profits, I cannot at present with clearness "decide. Perhaps the established rule in respect to ship "and cargo of a loss of more or less than half the subject "in value may be applicable. If so the question here will "be whether the more profitable half of the cargo might "not have been brought in the same ship to New York. "I suggest this as a rule that may perhaps apply."
>
> *Abbott* v. *Sebor*, 3 *Johnson's Cases*, 39, 46.

TWELFTH.—The learned Judges of the Circuit Court of 25
Appeals have, it is respectfully submitted, erred in holding against the finding of the learned District Judge, that there was not in this case an absolute total loss to the petitioner of its profits.

They have fallen into error in this respect by overlooking the fact that each and every pound of the sugars saved from the *John E. Sayre* was burdened with the salvor's lien of fifty per cent., which far exceeded the ratio of insured profits.

They have overlooked also the circumstance that the sugars were practically abandoned, as found by the learned District Judge, to the cargo insurer, and that such abandonment was accepted and that the insurer on the sugars reduced such sugars to its own possession. 26

They have overlooked the fact that the sugars were not delivered to the petitioner by virtue of any contract of carriage or in any ordinary course, but that they were turned over by the insurer of the sugars to the petitioner in part payment of the insurer's liability just as any other property might by agreement have passed from one to the other.

They have erred in holding that there can be no constructive total loss of profits, and they have fallen into this error through the cautious intimations of certain text writers whose remarks upon this subject relate to circumstances where a certain portion of the goods (in respect of which profits were insured) have in ordinary course reached to destination in sound condition and been de- 27
livered by the carrier to the assured in regular course of transportation.

They have failed to note the distinction in this case that the sugars which came to Montreal were never delivered by the carrier to the petitioner, and that the sugars which survived the wreck were reduced by salvage charges and by physical injuries to a sum much less than one-half of the sound value of such sugars.

THIRTEENTH.—The Circuit Court of Appeals have further erred respecting the facts of the case before them in saying:

28 "By the decree of the Court below the libellant has "been awarded a recovery which, if collected, would put "into its pocket the profits realized on the cargo saved "in addition to the amount of the respondent's policy. "Irrespective of this consideration and because it has "received the profits on a part of the cargo, we are of the "opinion that there has not been a total loss of profits "within the meaning of the contract."

It is error to suppose that any profits survived. The value of the cargo was about $181,000, by admission of the pleadings. This amount was covered by an insurance of $166,145 in the Atlantic Mutual Insurance Company, upon cargo, and by $15,000 in the Insurance Company of North America on profits.

29 All that the petitioner ever received was $142,748.81 in cash from the Atlantic Mutual Insurance Company and the 325 tons of damaged sugars which reached Montreal.

It thus appears that the damaged sugar was taken over at a valuation of $23,396.19, in its damaged and unassorted condition. This was its full value. The pleadings more than admit that it was worth only "about $20,000" (*Answer, fol.* 67). Mr. Drummond's testimony shows that the value at which the sugar was taken was its fair, actual value in its damaged condition.

The entire payment from the Atlantic Mutual Insurance Company to the petitioner in cash and in sugars thus aggregated not more than $166,145, and if the decree of the
30 District Court should be enforced the amount paid to the petitioner would bring its collections up barely to the $181,000 which the sugars were actually worth, as admitted by the pleadings.

There is absolutely no point of view in which it can be said that the payment of the District Court would result in putting $10,000 or any other sum whatever in the pockets of the petitioner in excess of its actual loss.

A similar error has been made by the Circuit Court of Appeals in adopting the premise that the petitioner "has received the profits on a part of the cargo." The petitioner received a part of the cargo practically by barter

and sale from the Atlantic Mutual Insurance Company. 31
It received those goods at their value and without profits.

FOURTEENTH.—Your petitioner avers that this case is one in which it is proper for the Court to issue a writ of *certiorari* for the following reasons:

First.—Because there is no authoritative judicial decision in this country upon the point as to what constitutes a total loss of profits.

Second.—Because there is no authoritative judicial decision in the United States as to whether a constructive total loss of profits is permissible.

Third.—Because the Circuit Court of Appeals have 32
erred in holding that the payment of the petitioner's claim would result in more than indemnity to the petitioner.

Fourth.—Because the Circuit Court of Appeals have erred in holding both as matter of fact and law that the petitioner has received the profits on a part of its cargo.

Fifth.—Because there is disagreement between the learned District Judge and the Judges of the Circuit Court of Appeals in respect of the rules of law applicable to the case.

Sixth.—Because the leading judicial decision in Eng- 33
land (*Asfar & Co.* v. *Blondell, Law Rep.*, 1 *Q. B.*, 1895-6, *p.* 123) is directly opposed to the principles of law announced by the Circuit Court of Appeals. This decision is entitled to special consideration not only because of the general harmony between the law of Great Britain and of the United States upon questions of commercial law, but because the insurance herein was made and the loss occurred within the territorial jurisdiction of Great Britain.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring this case before this

Honorable Court and for such other relief as to this Honorable Court may seem just.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
By HEWLETT & LEE, Agents.

CITY AND COUNTY OF NEW YORK, }
Southern District of New York, } ss.:

GEORGE HEWLETT, being duly sworn, says he is a member of the firm of Hewlett & Lee, agents in New York of the Canadian Sugar Refining Company, Limited, the petitioner herein, and that he is authorized to make this verification on its behalf. He has read the foregoing petition and knows the contents thereof, and the allegations contained therein are true according to deponent's information and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and record of the cause in the District Court of the United States and in the United States Circuit Court of Appeals.

Deponent further says that the Canada Sugar Refining Company, Limited, is a foreign corporation, and none of its officers reside within the United States, but on the contrary, reside in the Dominion of Canada, where they now are.

GEORGE HEWLETT.

Sworn to before me this 27th day of April, 1898.

CHARLES FLYNN,
[SEAL.] Notary Public,
New York County.

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion the petition is well founded, and is one upon which the prayer of the petitioner should be granted.

WILHELMUS MYNDERSE.